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Sessional Working Group
on Detention

Note by the secretariat

At the last session of the Working Group on Detention, the Working Group had before it a working paper (E/CN.4/Sub.2/1991/WG.1/WP.1) presented by Mr. Juan Carlos Hitters and Mr John Carey on the question relating to habeas corpus and amparo as non-derogable rights. Having considered it, the Working Group requested Mr. Carey and Mr. Despouy to submit an elaborated working paper on this question.

Consequently, the attention of the Working Group is drawn to the attached working paper submitted by Mr. Carey on derogability of habeas corpus in the context of the Constitution of the United States of America.

Derogability of habeas corpus and amparo in the United States:
Working paper presented by Mr. John Carey

1. One way of assessing the pros and cons of derogability of habeas corpus and amparo is to compare the legislative histories of various constitutional provisions in which such remedies either are or are not made derogable. In so far as records of the debates leading up to a particular provision reveal the arguments adduced, it is possible to understand why a given provision was adopted. One such provision is that of the Constitution of the United States of America, which makes habeas corpus qualifiedly derogable.

2. Once the reasons for derogability or non-derogability clauses are identified and compared, then their practical application can be reviewed to determine whether the expectations of the drafters have been borne out by actual experience.

3. The Constitution of the United States of America provides as follows, in article I, section 9: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." 1/ This language was not added by amendment as was the Bill of Rights but was part of the original text drafted at the Constitutional Convention held in Philadelphia in the summer of 1787.

4. Original documents from the 1787 Convention have been collected and issued in a series of four volumes edited by Max Farrand and entitled The Records of the Federal Convention of 1787, supplemented by a fifth volume in 1987, all published by Yale University Press. Documents quoted below are found therein, volume and page being indicated. Further background is available inter alia in Willian F. Duker, A Constitutional History of Habeas Corpus (Westport, Connecticut, and London: Greenwood Press, 1980) which states at page 141: "Like the writ itself, the notion that the benefit of the writ of habeas corpus might be suspended for the public good in times of urgent political necessity was derived from English practice." 2/

5. On 20 August 1787 a number of provisions were referred to a committee, including (vol. II, p. 334):

> "The privileges and benefit of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding .. months."

6. The committee reported on 28 August 1787, and the following wording, almost identical to the final version, was passed by a vote of 7 states in favour and 3 against: "The privilege of the writ of habeas corpus shall not be suspended; unless where in cases of rebellion or invasion the public safety may require it." (Vol. II, p. 435.)

7. The words following "suspended" were debated. One speaker preferred "should not be suspended but on the most urgent occasions, and then only for a limited time not exceeding 12 months." Another "was for declaring the Habeas Corpus inviolable." A third "doubted whether in any case (a suspension) could be necessary, as the discretion now exists with judges, in most important cases to keep in gaol or admit to bail." (Vol. II, p. 438.)

8. The key vote on derogability then occurred, following unanimous adoption of the language as far as "suspended." By a vote of 7 states in favour to 3 against, the following additional words were approved: "unless where in cases of rebellion or invasion the public safety may require it." (Vol. II, p. 438.)

9. Thus the wording as set forth in paragraph 7 above was sent to the Committee on Style and Arrangement (vol. II, p. 565, 576). That Committee recommended the following: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." (Vol. II, p. 590, 596.) The final text as engrossed on parchment reverted to the initial capitalization of nouns as in paragraph 4 above (vol. II, pp. 651 and 656).

10. Maryland was one of the 7 states that voted in favour of the derogability clause (vol. II, p. 438). One of the Maryland Convention delegates, James McHenry, spoke favourably of that stand before the State House of Representatives: "Public safety may require a suspension (sic) of the ha: [sic] corpus in cases of necessity: when those cases do not exist, the virtuous citizen will ever be protected in his opposition to power, 'till corruption shall have obliterated every sense of honour and virtue from a brave and free people." (Vol. III, p. 149.)

11. Another Maryland Convention delegate, Luther Martin, took a strongly opposed position (vol. III, p. 157):

> "Nothing could add to mischevious [sic] tendency of this system more than the power that is given to suspend the act of ha: corpus - Those who could not approve of it urged that the power over the ha: corpus ought not to be under the influence of the general government. It would give them a power over citizens of particular states who should oppose their encroachments, and the inferior jurisdictions of the respective states were fully competent to judge on this important privilege; but the almighty power of deciding by a call for the question, silenced all opposition to the measure as it took frequenty did to many others."

12. Mr. Martin's views were set forth even more strongly to the Maryland House of Representatives in the following summary:

> "As the state governments have a power of suspending the habeas corpus act in those cases, it was said, there could be no reason for giving such a power to the general government; since whenever the state which is invaded, or in which an insurrection takes place, finds its safety requires it, it will make use of that power. And it was urged, that if we gave this power to the general government, it would be an engine of oppression in its hands; since, whenever a State should oppose its views, however arbitrary and unconstitutional, and refuse submission to them, the general government may declare it to be <u>an act of rebellion</u>, and, suspending the habeas corpus act, may <u>seize</u> upon the persons of those <u>advocates of freedom</u>, who have had <u>virtue</u> and <u>resolution</u> enough to excite the opposition, and may <u>imprison</u> them during its pleasure, in the <u>remotest</u> part of the Union; so that a citizen of Georgia might be <u>bastilled</u> in the furthest part of New Hampshire, or a citizen of New Hampshire in the furthest extreme of the south, cut off from their family, their friends, and their every connection. These considerations induced me, Sir, to give my negative also to this clause." (Vol. III, p. 213).

13. In a more resigned expression of regret the year after the Convention, Mr. Martin stated:

> "It was my wish that the general government should not have the power of suspending the privilege of the writ of habeas corpus, as it appears to me altogether unnecessary, and that the power given to it may and will be used as a dangerous engine of oppression, but I could not succeed." (Vol. III, p. 290.)

Conclusion and recommendation

14. The foregoing summary recitation of the legislative history of one country's basic law allowing qualified derogation of habeas corpus may provide a starting point for comparison with the legislative history of provisions elsewhere either allowing or forbidding derogation.

15. The benefit of a comparative study of arguments actually presented for and against derogability of habeas corpus or amparo would be that it would make possible a realistic evaluation of the arguments now being advanced in the context of the possible drafting of international instruments limiting derogability.

16. The Sub-Commission, either through its Working Group on Detention or in its own name directly, should consider whether to go forward with a comparative study of the kind mentioned above.

Notes

1/ The comparable provision of the Constitution of the state of New York is similar but with more up-to-date spelling and grammar: "The privilege of a writ or order of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it.", article 1, section 4.

2/ Duker also notes at page 142 that "it was the practice in the several states during the confederation period for the legislature to authorize suspension."